

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA COX, Personal Representative for the Estate
of THOMAS J. COX, Deceased,

UNPUBLISHED
June 25, 1996

Plaintiff-Appellant,

v

No. 179276
LC No. 91-009759

PHILLIP PFANNENSTIEL,

Defendant-Appellee,

and

JASON McCRORY, a Minor,

Defendant-Nonparty.

Before: Hood, P.J., Markman and A.T. Davis, Jr.*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's February 7, 1994 order granting summary disposition in favor of defendant Phillip Pfannenstiel. We reverse and remand.

This case arises out of an incident resulting in the death of plaintiff's son, Thomas J. Cox ("Cox"), a sixteen-year-old Sault Area High School student. On September 17, 1991, Cox intervened in an argument on behalf of a fellow student and became embroiled in a verbal confrontation with another student, Jason McCrory.¹ A teacher reported the incident to defendant, who was the assistant principal of the school. Defendant attempted to call Cox's parents and assigned a teacher to phone McCrory's parents. McCrory's parents were contacted. However, defendant was unsuccessful in his one attempt to reach Cox's parents.

On September 18, 1991, defendant talked to both Cox and McCrory in his office regarding the incident. Defendant told McCrory that he would be suspended from school if he was involved in any

* Circuit judge, sitting on the Court of Appeals by assignment.

violent occurrences on the school grounds. When defendant spoke with Cox, Cox requested permission to leave school early to avoid a potential confrontation with McCrory. Defendant denied Cox's request. Plaintiff claimed that Cox told other students that defendant advised him to enlist the assistance of his friends to fight McCrory so that McCrory would be suspended from school. After leaving his last class, McCrory confronted Cox, an altercation ensued, and McCrory struck Cox in the temple area. Cox fell to the ground and later died.

On December 19, 1991, plaintiff filed a complaint against defendant. The complaint alleged that defendant had notice of a potentially violent confrontation between Cox and McCrory on the school campus. Plaintiff also alleged that defendant breached his duty and was grossly negligent by indirectly encouraging the conflict and failing to: prevent the conflict from becoming violent, post school personnel to prevent a possible altercation, allow Cox to leave early, and monitor Cox's and McCrory's exit from the school grounds, and that this gross negligence was a proximate cause of Cox's death.

On October 14, 1993, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7). The motion was predicated solely on *Dedes v South Lyon Community Schools*, 199 Mich App 385; 502 NW2d 720 (1993). In *Dedes*, this Court held that the Legislature intended to limit the liability of a government employee to instances where the employee's gross negligence is "the" proximate cause of an injury and not simply "a" proximate cause of an injury. *Id.*, p 392-393. As a result, the only issue presented to the court was whether defendant's actions were the sole proximate cause of Cox's death. For the purpose of the motion, defendant conceded that plaintiff pleaded and presented prima facie proof of gross negligence.

The trial court noted that defendant's actions, as a matter of law, were most likely not grossly negligent, but acknowledged that the question of gross negligence had not been presented to the court:

First, gross negligence as it is used in governmental immunity is conduct so reckless as to demonstrate a substantial lack of concern for whether such an injury result. . . . I realize gross negligence is conceded I don't even think when you look at the facts of the case, looking at all the documents, it is unlikely the Court would find that this amounts to gross negligence. As a matter of fact, the Court--you are not asking the Court, but really as a matter of fact, the conduct doesn't come within the standard of gross negligence.

* * *

But be that as it may, let's assume it was gross negligence, that's what we have to do for today's date.

The trial court, relying on this Court's reasoning in *Dedes*, concluded that defendant "could not possibly be the proximate cause of the injury," but that McCrory and Cox voluntarily engaged in the violent exchange.

Subsequent to the trial court's decision, the Michigan Supreme Court reversed this Court's decision in *Dedes*. *Dedes v South Lyon Community Schools*, 446 Mich 99; 521 NW2d 488 (1994). The Supreme Court held that in order to be the proximate cause of an injury, a defendant's conduct need not be the sole proximate cause. *Id.*, p 118. Rather, liability can attach to a governmental employee even if there exists another proximate cause of the injury. *Id.*

Plaintiff argues that the reversal of *Dedes* mandates reversal of summary disposition in favor of defendant. We review the trial court's grant of summary disposition de novo to determine if defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Township*, 209 Mich App 484, 486; 532 NW2d 183 (1995). When reviewing a grant of summary disposition based on a finding that the claim is barred by governmental immunity, all documentary evidence submitted by the parties is to be considered. *Id.* All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.*

In *Dedes*, the Supreme Court stated:

The Legislature intended to limit governmental employee liability to those situations in which *the conduct at issue was substantially more than negligent*. . . . The word "the" before "proximate cause" is not to be read to limit recovery if the plaintiff or another is also a cause of the accident. It is also not to be read to prevent a defendant from claiming comparative negligence as a defense. [*Dedes, supra*, 446 Mich 118; emphasis added.]

Therefore, the first question a court must consider is whether the conduct of a defendant was "substantially more than negligent" or grossly negligent, and not whether it was "the" proximate cause of an injury.

In this case, neither party addressed the issue of whether defendant's actions constituted gross negligence as a matter of law. Again, defendant conceded that plaintiff pleaded and presented prima facie proof of gross negligence for the purpose of the motion. However, the trial court specifically declined to base its decision on whether defendant was grossly negligent. Rather, it based its decision on the distinction between "the" sole proximate cause and "a" proximate cause. Accordingly, pursuant to the Supreme Court's reversal of *Dedes*, defendant was not entitled to summary disposition merely because his conduct was not "the" sole proximate cause of Cox's death. We therefore reverse the trial court's order granting summary disposition in favor of defendant, and remand to allow the trial court an opportunity to base its decision on the issue of whether defendant was grossly negligent.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ John J. McDonald

¹ Defendant Jason McCrory, with whom plaintiff has settled, is not a party on appeal.